United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7590

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

p/s

No. 76-7590

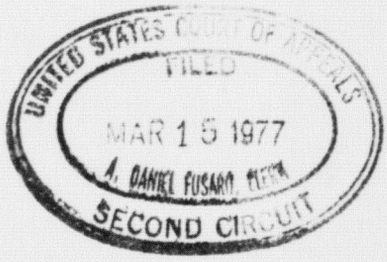
SEYMOUR LANDAU, and all others similarly situated,

Plaintiff,

-against-

THE CHASE MANHATTAN BANK, N.A.,

Defendant.



ON APPEAL from the UNITED STATES DISTRICT COURT for the SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS
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SEYMOUR LANDAU, and all others similarly situated, Plaintiff-Appellant,	
-against-	Docket No. 76-7590
THE CHASE MANHATTAN BANK, N.A., Defendant-Appellee.	

REPLY BRIEF FOR PLAINTIFF-APPELLANT

Preliminary Statement

The opposition of the defendant-bank to this appeal is predicated on a misreading of the legal standards established by this Court in Grinnell* and an erroneous assumption that the legal fee award here should be based on the so-called common or equitable fund theory, fatally discredited by Grinnell. Simultaneously ignored by the bank was the district court's failure to employ or articulate proper fee standards or to hold an evidentiary as to disputed facts, if any.

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* City of Detroit v. Grinnell, 495 F. 2d 448 (2d Cir. 1974)

Under the bank's view of Grinnell, it can pay its counsel for all legal services rendered in defending this action, including appeal on a quantum meruit basis, but plaintiff's counsel is limited to some arbitrary percentage of an actual pecuniary recovery and at an hourly rate ($26.00) which, upon information and belief, is substantially less than a junior associate of the bank's counsel.

Such a view, however, is violative of the bank's express agreement to pay plaintiff's attorneys fees "in such amount as shall be allowed by the Court"*. Further, such view is in utter disharmony with the principles of Grinnell, which sought to create a parity between counsel for the parties in class action litigation, to the extent possible, by mandating minimum quantum meruit recovery for plaintiff's counsel, augmented by a multiple to take into account the risk of litigation factor inherent in contingency litigation.

The quantum meruit fee recovery would reward plaintiff's counsel for actual services rendered, in the same manner as the bank's counsel. To retain this parity, Grinnell,

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* "Chase agrees to pay, subject to the approval of the Court, an attorney's fee to Sheldon V. Burman, Esq., attorney for plaintiff and the class, in such amount as shall be allowed by the Court..." (para. 2(b), Stipulation of Settlement) (A-47)

establishes an hourly fee for plaintiff's counsel commensurate with that which would "typically" be paid on a non-contingent basis, viz., what a defendant's counsel would charge.

The multiple applied to the minimum quantum meruit fee, also ensures a retention of this parity, by recognizing the contingent nature of the representation by plaintiff's counsel, in contrast to the fee paid by the bank to its counsel, "win, lose or draw."

POINT I

THE CLEARLY ERRONEOUS STANDARDS EMPLOYED BY THE COURT BELOW CONSTITUTE AN ABUSE OF DISCRETION WARRANTING REVERSAL.

A. Unrestricted Agreement to pay Legal Fees.

The bank explicitly agreed to pay a legal fee to counsel for plaintiff (A-47). The agreement of settlement contains no limitation related to an arbitrary percentage of the actual pecuniary recovery, nor any other limitation. The bank apparently now seeks to rewrite the Stipulation of Settlement to reflect is retrospective subjective position, although not found within the four corners of its contractual obligation.

Notwithstanding the above agreement, the bank asserts that the common fund doctrine is applicable herein. Concomitantly the bank also ignores the invalidation of this doctrine in Grinnell, where new standards were established, shifting to a quantum meruit plus contingent fee factor approach.

B. Time Expended.

The Court below makes no findings of fact with respect to the time expended by plaintiff's counsel. Indeed, the bank presented no evidentiary material whatsoever to rebut plaintiff's minutely descriptive fee application (A-85-115). Rather, the bank makes a blunderbuss objection to 235.75 hours which it claims were not compensable, as a matter of law (Br. 13-18). The gossamer texture of these legal objections is apparent from the following analysis.

Bank Objection	Analysis
1. 86 hours (one-half of 172.25 hours) "through the summary judgment motion" should be disallowed as it is based upon an "unsuccessful" compounding of interest claim.	Firstly, such claim was not "unsuccessful." Based upon this action the practice has not been followed since in or about November, 1973. Recognition of the economic benefits conferred by the cessation of such practice is set forth in the Stipulation of Settlement (A-45). The bank also errs in stating that 172.25 hours was the time period involved. Plaintiff's schedule of services (A-104) shows that only Items 1 through 5 are applicable. Those

Bank Objection	Analysis
	items total only 106 hours. Moreover, these five items indicate that a great preponderance of the time spent would have been expended whether or not the compounding practice were pursued. In any event, this objection would warrant a factual determination, not a legal one.
2. The time expended by plaintiff's counsel with respect to the obtaining an attorney's fee, is not compensable.	This position ignores this Court's recent decision in Torres v. Sacks, 538 F. 2d 10 (2d Cir. 1976), a'f'g. 69 F.R.D. 343 (S.D.N.Y. 1975). In Torres, counsel for the plaintiff was awarded fees for 85.15 hours expended on its legal fee application, which comprised one-third of the total time spent in the litigation. (69 F.R.D. at 348) In this action, only 38.05 hours, including discovery of defendant's counsel fees, out of a total of 482.25 hours, was requested, or less than 8% of the time expended. It also ignores Grinnell, on remand, (CCH Trade Cases 1976-1, para. 60,913 (S.D.N.Y. 1976) which states that plaintiff's counsel "is entitled to compensation for preparing and supporting their fee applications in this Court and the Court of Appeals." (p.68,982) Thus, both factually and legally, the plaintiff's request for such compensation is entirely appropriate.
3. Items 50, 51 and 52 of plaintiff's Schedule of Services Rendered (A-108), should be disallowed.	(a) Item No. 50 represents 400 separate communications between litigants and inquiring class members, numbering over 65 000, who had been sent notice of pendency of this action. The number of communications had been reconstructed from a review of plaintiff's files and other records. An average of ten minutes per communication has been

Bank Objection	Analysis
	attributed to each of them. Such average time, would appear conservative. Such reconstruction is entirely proper. In Re Borgenicht, 470 F. 2d 283,284 (2d Cir. 1972); Grinnell, supra, on remand.
	(b) Item. No. 51 in the amount of 35.25 hours represents miscellaneous time reconstructed from a review of plaintiff's files and records.
	(c) The ten hours set forth in Item 52, as an estimate of the time to conclude the litigation, has been grossly underestimated, as this appeal confirms. In any event, the propriety of Items 50, 51 and 52 would warrant a factual determination, not a legal one.

Even the bank's wholly speculative and unproven allegations leave unchallenged 246.5 hours. (Def. Br., p. 18) Such a small amount of hours expended for the successful prosecution of a vigorously defended class action, however, based upon a novel theory for which there was no precedent and no prior governmental action, is on its face, patently absurd.

C. Hourly Rate.

The bank fails to rebut plaintiff's contention that the propr hourly quantum meruit fee is $150.00. For example, in the public interest litigation of Serrano v. Priest, (Sup. Ct. L.A. Co. Calif. Docket No. C-938-254), the Court awarded $150.00 per hour for an attorney admitted only 4 years. (Pl. Main Br., p.29-30) The bank merely distinguishes Serrano as not being

applicable because dependent upon the "private Attorney General" theory of recovery. It ignores that the measure of legal recovery would be identical. (Main Br., 22-26)

The bank seeks to make much ado over the fact that plaintiff's counsel did not reveal his usual hourly fee for non-contingent litigation. Such matter is irrelevant as the plaintiff does not have a usual non-contingent fee in class action situations, as his representation is on the plaintiff's side.*

D. Findings of Fact.

The bank further claims that plaintiff has waived an evidentiary hearing. One can understand the bank's making this assertion, as the Court below did not make any findings offact, receive any rebuttal evidence from the bank, or state that items of services were being rejected, as a matter of law. No such waiver has taken place. The order of the Court approving the settlement, specifically provided in paragraph 4 thereof, (A-67) that the Court would "fix a date for hearing such application" for plaintiff's legal fee.

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* For the Court's information, the usual hourly rate of plaintiff's counsel for non-contingent, non-class action litigation, would be $100.00. However, it would be substantially higher for class action litigation, which is a specialty, if such a remote occurrence would take place.

No such hearing was called, although it is clear that if further factual development were necessary, a hearing was mandatory. If on the other hand, the Court below struck out certain hours, as a matter of law, or on the unrebutted factual allegations of plaintiff's fee application, it should have articulated its approach so that this Court could properly review the basis for its setting of the legal fee.

E. Risk of Litigation Factor.

As stated in Grinnell, this factor is dependent foremost on the probability of success of the litigation. Under the circumstances herein, where a novel claim was successfully adjudicated in favor of the class, without precedential assistance from other cases or governmental activity, a great risk that no matter how vigorous the prosecution of the action was, it could be unsuccessful, was obvious. In view of this high degree of risk, a multiple of twice the quantum meruit rate, would provide just compensation to plaintiff's counsel.

The bank, to the contrary, asserts that a multiple is not "deserved" because of the "negligible" recovery and "based on a theory of liability developed by the Court below." (Br., p. 25). With respect to the recovery obtained, defendant does not

distinguish those cases cited by plaintiff where substantial fee recoveries were obtained although solely injunctive relief of a non-pecuniary were obtained. The bank's position wouldlogically mean that counsel fees could be obtained for any reasonable amount where injunctive relief was obtained, but if any monetary recovery was had, this would set a limitation on the amount of the legal fee. To state the proposition is to see its speciousness.

With respect to the theory of liability utilized by the Court below, the plaintiff had challenged the propriety of the illegal practice based upon a violation of New York Banking Law, Sec. 108(5) and the National Bank Act. (12 U.S.C. Secs. 85,86) These were the precise provisions by which the Court below adjudicate that the bank's practice was illegal. (para. (5), A-35) In any event, this would not be relevant to the primary risk of litigation factor.

POINT II

DISCOVERY SOUGHT AS TO LEGAL FEES OF THE BANK WERE SOUGHT IN GOOD FAITH, FOR LEGITIMATE PURPOSES, AND SHOULD BE REVEALED.

The cases cited by the bank to show the lack of relevance, or the shield of the attorney-client privilege, with

respect to fee information, all involve the seeking of fee arrangements of plaintiff's counsel at the threshhold of litigation. The only purpose of such an in limine examination would be the harrassment and intimidation of plaintiff in the pursuit of an action. They are wholly irrelevant to the discovery sought herein.

Even defendant concedes that the legal fee arrangements may be discovered where it relates to possible conflict of interest situations or shareholder actions. (Br. p. 56), i.e., for legitimate purposes. The within action presents a situation where a legitimate purpose would be served by the revelation of the legal services rendered in the unsuccessful defense of this litigation on behalf of the bank, an adjudicated wrongdoer, and the hourly rate(s) applicable to such services.

Obviously, if the bank had been billed for 1,000 hours in the defense of this litigation, the reasonableness of the 482.25 hours requested by plaintiff, or the unchallenged 246.5 (Def. Br. p. 18) would be apparent.* Similarly, if the "senior" attorney for the bank's counsel were billing at the rate of $150.00 per hour, this would be a substantial consideration in

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* On this appeal, for example, the bank's opposition brief indicates that three attorneys have worked on this appeal. It can be assumed that each of them shall be compensated. It can be further assumed that the total amount of hours and the total fees paid to these three counsel for their services on the appeal, will be substantially greater than that of counsel for plaintiff.

establishing the proper hourly rate for the counsel of plaintiff.

Even if such comparisons of hourly fees and time expended would not necessarily be compelling, it would certainly provide information "relevant" to setting the legal fees of plaintiff's counsel, within the broad parameters of the federal discovery and evidentiary rules.

Conclusion

For all of the following additional reasons, the relief requested by appellant, should be granted in its entirety.

Dated: New York, New York
March 15, 1977.

Respectfully submitted,

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Affidavit of Service By Mail

STATE OF NEW YORK)
:
COUNTY OF NEW YORK)

RONNIE SCHULTZ , being duly sworn, deposes and says that deponent is over the age of 18 years and resides at Brooklyn, N. Y.

That on the 15th day of March 1977, deponent served the within Reply Brief (two copies) upon the following named at the addresses shown:

Milbank, Tweed, Hadley & McCloy, Esqs.
One Chase Manhattan Plaza
New York, N. Y. 10005
Attorneys ofrDefendant- Appellee

The above addresses designated by the said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in a--post office--official depository under the exclusive care and control and custody of the United States Post Office Department within the State of New York.

Sworn to before me this 15th day of March, 1977.

Ronnie Schultz
RONNIE SCHULTZ

Notary Public

SHELDON V. BURMAN
Notary Public, State of New York
No. 31-5533585
Qualified in New York County
Commission Expires March 30, 1978